

STATE OF MICHIGAN
COURT OF APPEALS

KRAMER ENTERTAINMENT AGENCY, INC.,

Plaintiff-Appellant,

V

THEODORE FREEDMAN,

Defendant-Appellee.

UNPUBLISHED

April 18, 2006

No. 265320

Allegan Circuit Court

LC No. 04-36962-CK

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Plaintiff Kramer Entertainment Agency, Inc., appeals as of right the circuit court's grant of summary disposition under MCR 2.116(C)(10) to defendant Theodore Freedman, formerly a sales representative for plaintiff, in this breach of contract action. The circuit court concluded that defendant was an employee, and not an independent contractor of plaintiff, and that the promissory note defendant signed evidencing indebtedness to plaintiff, under which plaintiff sued defendant for breach of contract, was therefore void for failure of consideration. We reverse and remand for further proceedings.

I

Plaintiff is a corporation and entertainment agency that leases simulators and interactive games to colleges and other venues. Plaintiff hired defendant to sell its services in March 2003. The parties executed a written "Independent Contractors Agreement" that plaintiff drafted. Defendant entered into a substantially identical "Independent Contractors Agreement" with Entertainment by Kramer, Inc., a corporation separate from plaintiff Kramer, but owned by the same shareholders, operated by the same officers, and controlled by the same directors. Both agreements were for two-year terms. Section XII of both agreements provided:

Representative is an Independent Contractor which means that Representative is not an employee of the Company. Representative shall be responsible for payment of his or her own withholding and Social Security taxes and shall only be furnished a (sic) IRS Form 1099 at the end of each calendar year by the Company.

Representative shall pay all of his or her own expenses in connection with the solicitation of sales under this Agreement. Except, Company shall allow Representative to use its telephone and office spaces at no cost to the

Representative. In the event that Representative desires to attend trade shows, seminars, new product screenings or entertainment service related functions, or if Representative desires to have business cards, Representative shall be solely responsible for all costs or expenses incurred, if any. The only obligation of the Company is to pay the applicable commission specified in this Agreement. However, Company reserves the right to pay costs and expenses on behalf of Representatives when such costs or expenses are incurred on the request of the Company, and are of such a nature that the Company may deduct them as legitimate business expenses for tax purposes on its corporate tax returns. Company agrees that it will reimburse Representative for any and all necessary, customary, and usual expenses incurred by him or her while traveling for and on behalf of the Company pursuant to Company's directions.

Under the agreements, defendant's earnings were commission-based, and the "Company", i.e., Kramer or Edu-Tainment, could in its discretion, advance monies to defendant which would be charged against commissions as they were earned and received:

Although commissions shall not be due and payable to Representative until a customer has paid its account in full, Company may, at its sole discretion and without recourse, credit Representative with a drawing account in an amount and for a term to be agreed upon between Company and Representative, and which shall be charged against Representative's commissions, as those commissions are earned and received. Company shall in no way be obligated to pay Representative's advance credit except at its discretion, and provided that Representative has not exceeded or over-drafted on his or her drawing credit account as determined and agreed upon by Representative and Company at the time of the execution of this Agreement.

Any such advances made by Company to Representative, whether withdrawals against commission or otherwise, shall be considered as loans to Representative to be repaid to Company on demand. Representative shall sign Demand Promissory Notes acknowledging the receipt of such advances or withdrawals against commission at the time Representative receives the loan, credit, advance or withdrawal. Likewise, Representative shall permit and does hereby agree that his or her earned commissions shall first be assigned, paid to and applied to Representative's Drawing, Loan, Advance or Credit account until such account has a zero balance and is thereafter maintained at a zero balance. Any commissions owed by Company to Representative that become earned and due after Representative's appointment is terminated shall first be applied to Representative's Drawing, Loan, Advance or Credit account before paying any remaining balance to Representative. Upon the termination of this Agreement, all Promissory Notes, loans, advances, withdrawals or credits on Representatives account shall become immediately due and payable upon the written Notice and Demand of the Company. . . .

Company shall furnish Representative weekly or monthly statements in which commissions, credit advances, expense advances or withdrawals against commissions are set forth in writing according to the Company's then current

bookkeeping systems. Representative hereby assumes and accepts full responsibility to reconcile all of Company's statements to his or her own records, and any disputes, inaccuracies, errors or omissions must be brought to the attention of the Company by the Representative within 10 days after receiving such statement or the Representative shall be deemed to have agreed that he/she has been paid in full, that the Company's statement is accurate in all material respects and sign a Reconciliation and Release Agreement as verification for each commission check issued or credited against Representative's account.

Defendant signed a number of "Demand Promissory Notes" and "Reconciliation and Release Agreements" evidencing "loans" from plaintiff, credits to the loan accounts, and payments of commissions earned.

In August 2004, defendant ended his employment with plaintiff and Edu-Tainment. During the sixteen months defendant worked for plaintiff, he earned commissions totaling \$12,747.53. Plaintiff paid defendant a \$600 commission draw check each week, totaling \$40,440.00. Plaintiff's letter accepting defendant's resignation stated that defendant owed plaintiff Kramer \$27,692.47 for advances or draws against future commissions. Defendant signed a demand promissory note and reconciliation and release agreement acknowledging such in August 2004.

After defendant made no payments, plaintiff filed a one-count complaint, alleging breach of contract of the "draw" account, and seeking \$27,692.47, and costs, interest and attorney fees.

Defendant moved for summary disposition under MCR 2.116(C)(10), asserting, inter alia, that although the employment agreement he signed with plaintiff purported to create an independent contractor relationship, both the IRS and Michigan's unemployment agency had concluded he was an employee, not an independent contractor, thus the employment agreement failed of its essential purpose and was unenforceable, and violated public policy to the extent it attempted to subvert plaintiff's obligation to pay state and federal taxes.

Plaintiff's response to defendant's motion argued issues of fact existed such that defendant's motion should be denied for reasons including that: 1) the IRS' preliminary ruling that defendant was an employee of plaintiff was now under re-consideration, 2) plaintiff loaned money to defendant voluntarily and not as a condition of employment or continued employment, and 3) defendant was personally responsible for repaying the debt as evidenced by the promissory notes defendant signed.

Documentary evidence submitted below included the preliminary ruling of the IRS dated May 26, 2005, which concluded that defendant was an employee of plaintiff for federal tax purposes. Defendant testified at deposition that he was assured by plaintiff that negative draws would not have to be repaid and that he left employment with plaintiff because he realized that he would never be able to earn commissions commensurate with advances.

After the circuit court granted defendant's summary disposition motion, the IRS reversed its preliminary ruling and concluded defendant was an independent contractor of plaintiff. Plaintiff moved for reconsideration in the circuit court. The circuit court denied plaintiff's motion for reconsideration, and this appeal ensued.

II

Plaintiff contends that questions of fact remained such that defendant not entitled to judgment as a matter of law. We agree.

This Court reviews the circuit court's grant of summary disposition de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The facts and all documentary evidence must be viewed in the light most favorable to the non-moving party. *Id.* at 278.

The court concluded that the agreement failed for lack of consideration because defendant was an employee and not an independent contractor. Although the contract recited that defendant was an independent contractor, it does not automatically follow that plaintiff's payments to defendant under the contract were not subject to recoupment as a matter of law if defendant was more properly characterized as an employee.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Karen M. Fort Hood